

**BEFORE THE DIRECTOR  
OF THE WATER RESOURCES DEPARTMENT  
OF THE STATE OF OREGON**

**KLAMATH BASIN GENERAL STREAM ADJUDICATION**

In the Matter of the Claim of the	)	PARTIAL ORDER OF
UNITED STATES DEPARTMENT OF	)	DETERMINATION
AGRICULTURE, FOREST SERVICE	)	
	)	
	)	Water Right Claim 476

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The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

**A. FINDINGS OF FACT**

1. On April 29, 1997, the UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE (USFS) timely submitted a Statement and Proof of Claim (Claim 476) to the Oregon Water Resources Department (OWRD) pursuant to ORS Chapter 539 in the Klamath Basin Adjudication claiming a federal reserved water right under the Organic Administration Act of 1897, 16 U.S.C. §§ 473-478, 479-482 and 551 (Organic Act).
2. On August 3, 1999, the USFS timely amended Claim 476 as follows: (1) claimed water quantities were amended for the “[i]ntegration of water availability estimates provided by Oregon Water Resources Department pursuant to OAR 690-28-040(5)” and (2) “[f]urther analysis of fire records showed that numerous wildfires occur during the month of May, so the claim was amended to include that month.”
3. The August 3, 1999 amendment to the original claim changed the period of use from June 1 through November 15 to May 1 through November 15, and increased the natural flow from 9.9 cfs to 10.0 cfs for July 1 to July 31, and 8.3 cfs to 9.4 cfs for Aug. 1 to Aug. 31. The amendment was a result of the exchange of correspondence between OWRD and the Claimant concerning the Claimant’s need to incorporate information concerning instream flow requirements. OWRD intended to provide this information to the Claimant, but it was not available at the time of the claim filing deadline.
4. On October 4, 1999, following investigation of the evidence submitted, the Adjudicator issued a Summary and Preliminary Evaluation of Claims (Preliminary Evaluation) stating the claim was approved as amended on August 3, 1999.

5. On May 5, 2000, the Claimant, USFS, timely filed Contest 2166 to the Preliminary Evaluation of Claim 476.
6. On May 1, 2000, William J. Rust and Ethel J. Rust timely filed Contest 145 to the Claim and/or Preliminary Evaluation of Claim 476.
7. On May 1, 2000, Leonard Baio timely filed Contest 380 to the Claim and/or Preliminary Evaluation of Claim 476.
8. On May 2, 2000, Gary Strong timely filed Contest 615 to the Claim and/or Preliminary Evaluation of Claim 476.
9. On May 2, 2000, the Flynn Brothers (Con and Nora Flynn), and Con, Nora and John Flynn timely filed Contest 850 to the Claim and/or Preliminary Evaluation of Claim 476.
10. On May 2, 2000, Robert Bartell timely filed Contest 1085 to the Claim and/or Preliminary Evaluation of Claim 476.
11. On May 2, 2000, Margaret Jacobs timely filed Contest 1320 to the Claim and/or Preliminary Evaluation of Claim 476.
12. On May 2, 2000, Carolyn Obenchain timely filed Contest 1554 to the Claim and/or Preliminary Evaluation of Claim 476.
13. On May 4, 2000, Ambrose W. McAuliffe and Roger Nicholson timely filed Contest 1796 to the Claim and/or Preliminary Evaluation of Claim 476.
14. On May 4, 2000, Rodney Z. James timely filed Contest 1903 to the Claim and/or Preliminary Evaluation of Claim 476.
15. On May 5, 2000, Newman Enterprise (Douglas Newman) timely filed Contest 2355 to the Claim and/or Preliminary Evaluation of Claim 476.
16. On May 5, 2000, Francis Loving Trust, Hilda Francis Trustee timely filed Contest 2592 to the Claim and/or Preliminary Evaluation of Claim 476.
17. On May 8, 2000, John Briggs timely filed Contest 4342 to the Claim and/or Preliminary Evaluation of Claim 476.
18. On May 8, 2000, Peter M. Bourdet timely filed Contest 4577 to the Claim and/or Preliminary Evaluation of Claim 476.
19. On May 8, 2000, Vincent Lee Briggs timely filed Contest 4810 to the Claim and/or Preliminary Evaluation of Claim 476.

20. On May 8, 2000, Thomas William Mallams timely filed Contest 5053 to the Claim and/or Preliminary Evaluation of Claim 476.
21. On May 8, 2000, Thomas H. Bentley timely filed Contest 5286 to the Claim and/or Preliminary Evaluation of Claim 476.
22. On May 8, 2000, Thomas E. Stephens timely filed Contest 5519 to the Claim and/or Preliminary Evaluation of Claim 476.
23. On May 8, 2000, Waterwatch of Oregon, Inc. timely filed Contest 2905 to the Claim and/or Preliminary Evaluation of Claim 476.
24. These matters were referred to the Office of Administrative Hearings for a contested case hearing. The Office of Administrative Hearings designated these matters and other like claims of the USFS as Case 009.
25. On July 2, 2002, the following contestants withdrew with prejudice their respective contest: Leonard Baio, Gary Strong, Flynn Brothers, Robert Bartell, Margaret Jacobs, Carolyn Obenchain, Rodney Z. James, Newman Enterprise (Douglas Newman), Francis Loving Trust, Hilda Francis Trustee, John Briggs, Peter M. Bourdet, Vincent Lee Briggs, Thomas William Mallams, Thomas H. Bentley, Thomas E. Stephens, David Cowan, successor in interest to William J. Rust and Ethel J. Rust, and Ambrose W. McAuliffe and Roger Nicholson. *See* NOTICE OF WITHDRAWAL OF BAIO *ET AL'S* CONTESTS AGAINST THE UNITED STATES FOREST SERVICE CLAIMS (July 2, 2002).
26. On February 25, 2003, Waterwatch of Oregon, Inc. voluntarily withdrew Contest 2905. *See* WATERWATCH'S VOLUNTARY WITHDRAWAL OF CONTESTS (Feb. 25, 2003).
27. On March 18, 2003, the OWRD and USFS executed STIPULATION TO RESOLVE CONTESTS 2162, 2163, 2166, 2168, 2169, 2171, 2172, 2174, 2177, 2184, 2186, 2188, 2190, 2192, 2194, 2196, 2198, 2200, 2201, 2203, 2205, 2207, 2209, 2211, 2213, 2214, 2216, 2218, 2220, 2222, 2224, 2225, 2227, 2229, 2231, 2233, 2234, 2236, 2238, 2240, 2242, 2244, 2246, 2248, 2250, 2252, AND 2253 (Settlement Agreement) which resolved the remaining contest (Contest 2166) to Claim 476.
28. On April 2, 2003, the Adjudicator withdrew Case 009 from the Office of Administrative Hearings.

## **B. DETERMINATION**

1. The Settlement Agreement executed between OWRD and USFS is adopted and incorporated as if set forth fully herein.
2. The instream flows recognized pursuant to this claim are not additive to any other instream flows based on other water rights, permits or claims within the same stream reach or a portion of the same stream reach.
3. The GENERAL CONCLUSIONS OF LAW CONCERNING AMENDMENT OF CLAIMS is incorporated as if set forth fully herein
4. OWRD finds that the claim amendment described in Findings 2 and 3, above, does not constitute a new claim under ORS 539.210. This determination is based on the factors described in Findings 2 and 3, above. Because the amendment occurred prior to the beginning of open inspection, it is permissible and is incorporated into the Claimant's claim for consideration in this Findings of Fact and Partial Order of Determination.
5. The Organic Administration Act of 1897 for a federal reserved water right is a valid basis for this claim. The GENERAL CONCLUSIONS OF LAW CONCERNING CLAIMS BASED ON THE ORGANIC ADMINISTRATION ACT OF 1897 is incorporated as if set forth fully herein.
6. Based on the file and record herein, IT IS ORDERED that Claim 476 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

**CLAIM NO. 476**

**CLAIM MAP REFERENCE:** MYLAR FILED AS CLAIM # 377, PAGE 217

**CLAIMANT:** UNITED STATES DEPARTMENT OF AGRICULTURE  
FOREST SERVICE  
1220 SW 3<sup>RD</sup> ROOM 1734  
PORTLAND, OR 97204

**SOURCE OF WATER:** CHERRY CREEK, tributary to FOURMILE CREEK

**PURPOSE OR USE:**

INSTREAM USE TO MAINTAIN A NATURAL FIRE BREAK AND SOURCE OF WATER FOR FOREST FIRE CONTROL

**PERIODS OF ALLOWED USE AND RATES:**

THE INSTREAM FLOW ALLOCATED PURSUANT TO THIS CLAIM IS NOT ADDITIVE TO ANY OTHER INSTREAM FLOWS WITHIN THE SAME STREAM REACH OR A PORTION OF THE SAME STREAM

Period of Use:	Natural Flow is Limited to Not More than the Following Rates in Cubic Feet per Second (CFS):
May 1 to May 31	66.0
June 1 to June 30	23.0
July 1 to July 31	10.0
Aug 1 to Aug 31	9.4
Sept 1 to Sept 30	9.1
Oct 1 to Oct 31	10.0

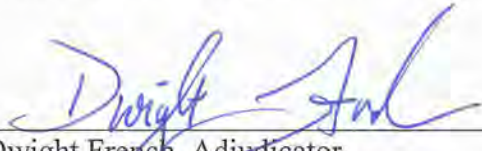
**DATE OF PRIORITY:** JUNE 4, 1897

**THE PLACE OF USE IS LOCATED AS FOLLOWS:**

CHERRY CREEK FROM NWNW, SECTION 28, TOWNSHIP 34 SOUTH, RANGE 6 EAST, W.M., TO NWSW, SECTION 14, TOWNSHIP 34 SOUTH, RANGE 6 EAST, W.M.

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

  
Dwight French, Adjudicator  
Klamath Basin General Stream Adjudication